In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-390

MICHAEL GEIER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial with others in the United States District Court for the Southern District of New York, petitioner was convicted of conspiracy to violate the federal securities and mail fraud laws (18 U.S.C. 371) and of substantive violations of the securities laws (15 U.S.C. 78i(a)(2), 78ff(a); 15 U.S.C. 77q(a), 77x) in connection with a scheme to manipulate the price of the stock of the Hercules Galion Corporation. The court sentenced him to imprison-

ment for six months on the conspiracy count, ordered probation for two years on another count, and suspended sentence on seven remaining counts. The court of appeals affirmed in a lengthy opinion which sets forth the facts in detail (Pet. App. 1a-36a). On July 18, 1972, a petition for rehearing was denied. The petition for a writ of certiorari was not filed until September 6, 1972, and is therefore out of time under Rule 22(2) of the Rules of this Court. In any event, there is no cause for further review.

Petitioner contends that the trial court committed reversible error in granting the government eight, instead of six, peremptory challenges (Pet. 9-15). In our memorandum in opposition to the petitions for certiorari filed by two of petitioner's co-defendants, *Projansky and Leavitt* v. *United States*, Nos. 72-135 and 72-272, we have dealt with this same argument. We rely on that response here. (A copy of our memorandum is being furnished to petitioner.)

Petitioner also claims that the evidence showed, at most, his participation in the third of three separate conspiracies rather than in a single conspiracy of which the several agreements were integral steps. He argues further that the trial judge erroneously failed to sever his prosecution from that of the other defendants. These contentions were adequately answered in the opinion below (Pet. App. 25a-26a, 30a), on which we principally rely. As the court below noted, the evidence established a single conspiracy to manipulate the price of Hercules Galion stock. We add only that in *Kotteakos* v. *United States*, 328 U.S. 750,

which petitioner stresses (Pet. 20-23), there were thirty-two defendants and, by the government's concession, at least eight distinct conspiracies connected only by the prominence of a single common figure. In the circumstances of the instant case, joinder of defendants presented no similar danger of improper transference of guilt.

Petitioner finally contends that there was no independent evidence, apart from testimony and statements of co-conspirators, linking him to the conspiracy (Pet. 24-25). A long line of decisions in the Second Circuit has held that the jury may consider all evidence in determining guilt beyond a reasonable doubt if the trial judge has first concluded that the defendant has been linked to the conspiracy by a "fair preponderance" of the evidence independent of hearsay utterances of co-conspirators.[1] As appears from the opinion below, the government produced ample independent proof of petitioner's connection with the conspiracy, including testimony of co-conspirators[2] (Pet. App. 18a-25a). Under these circumstances, there is no reason to conclude that the trial judge abused his discretion in letting the jury consider all the evidence.

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[1] See Pet. App. 29a, n. 26.

[2] The petition seems to reflect the mistaken notion that "independent evidence" must be exclusive of the testimony of co-conspirators (Pet. 24).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

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